

Mediation for Mediators? If You Talk the Talk, You'd Better Walk the Walk: An Examination of How Dispute Resolvers Resolve Disputes

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I. INTRODUCTION AND OVERVIEW

Is it important that mediators mediate?¹ No, not as the third party neutral, but rather as a mediating party. Should mediators be compelled to experience what it means to be mediated, so that they have full understanding of, and appreciation for, what those on the other side of the mediation table are going through? Many mediation instructors insist that all participants as part of training assume the roles of both the disputing parties and the parties' lawyers. Role-play experience can encourage understanding but is merely a simulation.² Often trainees are also required to observe a real mediation, but do so in the role of a detached spectator. Perhaps mediators should be required to experience the mediation of their own conflict before they are qualified to mediate the dispute of another.

Such a concept was the impetus for this research project. As a teacher and trainer of dispute resolution, most often in the form of mediation, I began to consider, from an educational perspective, the implications of asking the mediator to "be mediated." Additionally, two distinct personal events occurred which caused me to further ponder the extent to which individuals who "talk the talk" should be compelled to "walk the walk." Both situations involved my husband,³ a full-time mediator, and led me to this inquiry and continued contemplation of how dispute resolvers should be

¹ Mediation is but one of many alternative dispute resolution (ADR) processes, the more general term encompassing a number of very different procedures. See EDWARD A. DAUER, *MANUAL OF DISPUTE RESOLUTION, ADR, AND LAW PRACTICE* (1994); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 6-13 (1994). I am compelled to use both ADR and mediation in this piece since the questionnaire which served as source of the information sometimes used the generic term "ADR" and at other times asked specifically about mediation. I recognize that the ADR universe is diverse and complex, see Judith Resnik, *Many Doors? Closing Doors?*, *Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 218 (1995), but felt it was necessary to interchange the terms since the study targeted organizations whose membership is diverse with regard to ADR knowledge and experience. However, the focus of this thesis is on mediation for a number of reasons. On a national basis, mediation is currently receiving the most attention. Mediation is not only the process about which everyone is talking, it is also the most common to require additional specialized training regardless of the individual's previous education and experience. It is likely the most collaborative process and hence different from the common win-lose adversarial method of dispute resolution.

² The rare exception of conducting a real mediation during a training course has occurred on occasion when a conflict arose and the class actually mediated through the dispute.

³ Eric R. Galton, Austin, Texas, and author of *REPRESENTING CLIENTS IN MEDIATION* (1994).

resolving their own disputes. In the first instance, prior to our marriage, my husband was involved as a defendant in a commercial lawsuit. At the time the suit was filed, he had an active mediation practice, having mediated several hundred disputes. When faced with the possibility of submitting his own dispute to mediation, much to his credit, he did not hesitate and welcomed the opportunity. However, as the time for the mediation approached, and despite his training and experience, he manifested both concern and nervousness. His malaise did not specifically involve the process nor the mediator—rather, whether and how a resolution might be reached. It can be deduced that this concern about the result is also a concern about the process. After a full day of mediation which produced an agreement, he had a very different perspective of the process, particularly the caucus or shuttle approach methods.⁴ He had a greater appreciation of how individuals feel when left alone in a room for substantial periods of time. The mediating parties' desires and expectations of the mediator became much more evident.

The second situation occurred after we were married⁵ and in the process of purchasing a new home. We were diligent in attempting to apply principled negotiation⁶ to our dealings with the builder reaching, I believe, an "all-gains result."⁷ When it was time to review the closing and loan documentation, however, I noticed that the documents contained neither a mediation nor an alternative dispute resolution (ADR) clause. Such omission concerned me because I was committed, after discussions with colleagues, to the premise that mediators must "walk the talk."⁸ Much to

⁴ The mediation process with its myriad of definitions, KOVACH, *supra* note 1, at 16-17, possesses a number of theories, goals, methods, and techniques. See Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 NEGOTIATION J. 217 (1995) (reviewing ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION*; DEBORAH M. KOLB & ASSOCIATES, *WHEN TALK WORKS: PROFILES OF MEDIATORS* (1994)); THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF AMERICAN COMMUNITY JUSTICE (Sally Engle Merry & Nehl Milner eds., 1993). Use of the private caucus, or separating the parties, is one technique which is often debated. See *infra* notes 40-41 and accompanying text.

⁵ I admit, reluctantly, without a pre-nuptial mediation clause.

⁶ ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* 83 (2d ed. 1991).

⁷ See LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* 33 (1987).

⁸ Appreciation goes to Diane LaResche and E. Wendy Trachte-Huber, who, in an informal discussion, shared my concern about the need of conflict resolvers to resolve their own conflicts. Conversation with Diane LaResche, Ph.D., Santa Fe, New Mexico, and E. Wendy Trachte-Huber, Executive Director, A.A. White Dispute Resolution Institute,

my chagrin and dismay, my husband, despite having a positive mediation experience, felt ADR was not important enough to risk losing the deal by insisting that the documents be redrafted to include a mediation clause. Perhaps he anticipated that the parties would voluntarily agree to mediation if a dispute arose in the future. However, I preferred certainty and urged that we demand a mediation clause. As it turned out, we did not insist on such a provision.⁹

I began to think about the number and variety of contracts into which dispute resolution professionals must enter, including contracts with hotels for conferences, contracts to lease office space, and contractual arrangements with disputing parties and each other. I wondered if ADR clauses were included in any of these agreements. For if we, as a profession,¹⁰ strongly advocate the use of ADR and even provide sample forms to others so that they will include mediation clauses in contracts, should we not be setting an example?

Anecdotally and off the record, a few judges in Texas advised me that lawyers with pending lawsuits were refusing to participate in mediation. While some attorneys are still hesitant about ADR use,¹¹ these are the same lawyers who had previously talked to the judge in an effort to obtain referrals of cases to be mediated. In other words, these lawyers were attorney-mediators.¹² When requested to mediate cases in which they were

Houston, Texas, in Pegosa Springs, Colorado (July 1993).

⁹ I suppose in terms of BATNA (Best Alternative to a Negotiated Agreement), see FISHER ET AL., *supra* note 6, at 100, and certainly WATNA (Worst Alternative to a Negotiated Agreement), this result is better than no house.

¹⁰ Although those involved in dispute resolution are from varied backgrounds, now many consider dispute resolvers as forming a new profession. ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE, Report No. 2 of the SPIDR Commission on Qualifications, Preface [hereinafter SPIDR Report]; Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125, 125-27 (1988). A profession is defined as an occupation which has developed a special set of norms and forms a special role in society. Multiple criteria are considered including professional specialized knowledge and skill from education and training; a service orientation; development of trust between professional and client; full-time employment; and professional associations formed. See also EDGAR H. SCHEIN, PROFESSIONAL EDUCATION: SOME NEW DIRECTIONS 8-9 (1972). Most of these criteria are now met with regard to mediators and arbitrators.

¹¹ Although attorneys in some jurisdictions are still hesitant to use ADR on a regular basis (e.g., New York and Chicago), mediation is commonly used in both state and federal courts in, *inter alia*, Florida, Texas and California on a regular basis.

¹² "Attorney-mediator," a term indigenous to Texas, indicates that an individual is a licensed attorney, but more often than not serves as a mediator. Implicit is a legal focus and

representing a client, however, common responses were "Not me judge!" or "This case is different." Additionally, my personal experience demonstrates that those attorneys actively engaged in ADR bar work, who are still practicing law,¹³ can be overheard discussing deposition and trial strategy more often than negotiation strategy or mediation or arbitration advocacy. Others are encouraged to take advantage of the benefits of ADR processes;¹⁴ why should proponents not be experiencing those same benefits?

Another factor strongly influenced my thinking and impression of the need for research.¹⁵ Over the last few years, I have become disturbed by the number of disputes among dispute resolution professionals: for example, the attorney-mediators versus the non-attorneys; the for-profit versus the nonprofit organizations; court appointed versus non-court-appointed neutrals. My observations led me to conclude that dispute resolution professionals were having difficulty resolving their own disputes. I must admit, when I first raised this issue some time ago, I was advised that not all dentists have good teeth.¹⁶ While I have not verified the accuracy of such a statement, through personal experience I have noticed that most dental hygienists do have good teeth and, while not all lawyers obey the law, a presumption exists that they should. It seemed logical that if ADR provides such favorable methods for resolving disputes, then those individuals most familiar and knowledgeable would utilize the processes for themselves.

II. IMPORTANCE OF EXPERIENTIAL UNDERSTANDING

As I contemplated the relevancy and wisdom of recommending that mediators and other dispute resolution professionals become familiar with

style to the mediation process, see JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 133-134 (1984), and a desire to mediate primarily lawsuits. See also Carol Bohmer & Marilyn L. Ray, *Regression to the Mean: What Happens When Lawyers Are Divorce Mediators*, 11 *MEDIATION Q.* 109 (1993).

¹³ As distinguished from those lawyers who decline to represent parties and limit their practice to only serving as third party neutrals.

¹⁴ These articulated benefits include informality, confidentiality, savings of time and money, direct client involvement with the process, increased satisfaction, and compliance with the outcome. See Resnik, *supra* note 1, at 246-53.

¹⁵ This research is by no means exhaustive, and my primary hope and goal of this project was not to provide answers, but to stimulate discussion, debate, and continued inquiry on this point.

¹⁶ Remark of Larry Ray, Former Director, ABA Section of Dispute Resolution, circa 1988.

the ADR processes from the user perspective, potential advantages became apparent. By experiencing the process, a dispute resolver can gain knowledge and understanding of which he would otherwise be unaware. This experience appeared to be relevant to at least three primary issues which face dispute resolvers: matters of competency; definition and distinction of the ADR processes; and conflict within the profession.

A. The Learning Process

The field of professional education has been undergoing transformation. This transformation is evidenced by the addition of a number of activities to the educational process. Innovations going beyond the more traditional classroom or lecture format include self-paced study, independent study, and use of projects, apprenticeships and practical clinical experience.¹⁷ Many of these innovations demonstrate the need for experiential understanding. Experiential education involves the doing of activity and can be defined as learning which stems from an "analysis of past learning and current experience," and involves observation, interaction and reflection.¹⁸ The professional student's motivation to learn is enhanced if the learning process emanates from an integration of theory and clinical practice.¹⁹ The experience of learning by doing is particularly important when the subject matter involves skill development. The more detached one is from the subject, the less she can understand, especially if a skill is based on interpersonal interaction. Conversely, experience can breed competence. For instance, in nursing education it has been established that clinical experience contributed more to the development of competency than either nursing or non-nursing classroom experience.²⁰ In legal education, clinically trained law graduates are noted by others to be more confident and better prepared than those without clinical experience.²¹ This increased competency may be due to the fact that clinical experience provides active participation in the learning process which is very important to adult learners.²² The field of andragogy, or adult learning,²³ is based upon such a

¹⁷ SCHEIN, *supra* note 10, at 116.

¹⁸ PROFESSIONAL EDUCATION IN THE UNITED STATES: EXPERIENTIAL LEARNING, ISSUES AND PROSPECTS 192-93 (Solomon Hoberman & Sidney Mailick eds., 1994).

¹⁹ *Id.* at 20-21.

²⁰ Heather K. Spence Laschinger, *Impact of Nursing Learning Environments on Adaptive Competency Development in Baccalaureate Nursing Students*, J. PROF. NURSING, March-April 1992, at 105.

²¹ John J. Costonis, *The MacCrate Report: Of Loaves, Fishes and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 174 (1993).

²² The focus of this paper is on adult dispute resolvers. Some points may differ if the

premise.

There is no established requirement that other professionals such as doctors and teachers experience their profession prior to, or as a part of, the formal educational process. However, by the time one reaches professional school nearly every person has been treated by a physician and has experienced the learning process as a student. Others, such as engineers and business managers, are often not directly familiar with the profession until, or even after, the formal educational process. However, higher education has begun to incorporate experiential education into teaching.²⁴ For example, in the field of geology there is acknowledgement of the benefit of doing, not just reading, with regard to teaching,²⁵ and the students experience the subject matter via field trips.²⁶ Educators are calling for an increase in reflective education and the integration of practice within that process.²⁷ A clear call is made to educators to set an example by reflecting on their own teaching and research.²⁸

It is well established that all psychoanalysts must themselves experience psychoanalysis as part of their education. The basis for this prerequisite, originated by Freud,²⁹ is that the capacity to reflect on one's own unconscious motivations is essential to the development of therapeutic effectiveness.³⁰ Likewise, it is important that counselors have an understanding of themselves³¹ as they assist others in a search for meaning

subject was children, such as in peer mediation programs, although the use of experience in learning is likely beneficial in those cases as well.

²³ MALCOLM S. KNOWLES, *THE MODERN PRACTICE OF ADULT EDUCATION FROM PEDAGOGY TO ANDRAGOGY* 43 (1980). See also Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 325 (1982). See also notes 120-28 and accompanying text.

²⁴ MORRIS T. KEETON, *NEW DIRECTIONS FOR EXPERIENTIAL LEARNING* 17 (1983).

²⁵ Admittedly teaching and learning are different processes. While my primary focus is on learning and how experience affects the process, the role of the teacher can nevertheless be seen as crucial in providing the opportunities for learning, particularly the experiences. See also KNOWLES, *supra* note 23, at 47.

²⁶ Michael F. Follo, *Field Trips As A Teaching Method*, in *HANDBOOK OF COLLEGE TEACHING* 189 (Keith W. Prichard & R. McLaren Sawyer eds., 1994).

²⁷ Lynn Curry & Jon F. Wergin, *Setting Priorities for Change in Professional Education*, in *EDUCATING PROFESSIONALS: RESPONDING TO NEW EXPECTATIONS FOR COMPETENCE AND ACCOUNTABILITY*, 316, 319-20 (Lynn Curry & Jon F. Wergin & Assocs. eds., 1993).

²⁸ *Id.* at 321-22.

²⁹ MORTON HUNT, *THE STORY OF PSYCHOLOGY*, 182-83 (1993).

³⁰ DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* 220 (1987).

³¹ LEONA E. TYLER, *THE WORK OF THE COUNSELOR* 197 (3d ed. 1969).

and purpose.

Various methods are available for responding to conflict. The individual mechanisms chosen for dealing with disputes are patterned responses or tactics used repetitively.³² This learned behavior has been incorporated in the person over a number of years. Previous behavior must be changed as part of the process of learning any new conduct. An effective method of learning is to repeat the behavior, followed by reinforcement of the new conduct.³³ As individuals begin to integrate mediation and collaborative problem-solving skills into their behavior, they must first unlearn previously developed skills or patterns. Substitution of the new behavior follows. Rethinking and re-establishing methods of resolving conflict necessitates a paradigm shift.³⁴ This shift will take time, but is essential for the parties participating in mediation and other dispute resolution processes. However, it is much more important for the mediator to immediately change his view of conflict and disputing because it is the mediator's role to assist in the behavioral change of others. Individuals involved in mediation training often state their commitment to the process. Comments include observations that mediation is a wonderful, positive, and, foremost, an innovative way to deal with conflict.³⁵ Yet, it is unknown if the trainees have really integrated the concepts. In other words, do trainees take the mediation process to their homes and offices and implement its use or is mediation seen only as a vehicle through which trainees may assist *others* in reaching resolution to conflict?

B. Continuing Evolution of Mediation

In essence, use of the variety of ADR processes³⁶ in both courts and communities has developed over the last twenty years.³⁷ During that time,

³² JOYCE L. HOCKER & WILLIAM W. WILMOT, *INTERPERSONAL CONFLICT* (3d ed. 1991). See also EDWARD DEBONO, *CONFLICTS: A BETTER WAY TO RESOLVE THEM* 36 (1985).

³³ B.F. Skinner, *The Science of Learning and The Art of Teaching*, 24 HARV. ED. REV. 86 (1954).

³⁴ See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 18-19 (1962). The author first stated the concept of paradigm shift, or reconceptualization of a matter. See also STEPHEN R. COVEY, *THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE* 29-30 (1989).

³⁵ Based generally upon the author's experience over seventeen years of mediation training.

³⁶ For an overview of the processes, see STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 1-240 (2d ed. 1992). A more condensed overview is provided in KOVACH, *supra* note 1, at 6-13.

³⁷ KOVACH, *supra* note 1, at 6-13. See also NANCY H. ROGERS & CRAIG A. MCEWEN,

the processes have continued to change and evolve. Participants continue to experience newness with each and every case. For the neutral party, this experience is from one perspective: the impartial, intermediary view. The parties and their representatives³⁸ likely see the process differently. A neutral can broaden his vision of mediation or arbitration even further when the process is perceived from a different angle. Just as the litigator-turned-mediator often sees litigation differently and begins to incorporate mediation principles as problem-solving methods, a neutral who experiences ADR from a party's perspective will be more cognizant of, and sensitive to, the needs of those immersed in the dispute.

Moreover, as mediators and other neutrals continue with new experiences, their view of the process may change. For instance, in the early days of our modern mediation movement,³⁹ some viewed the caucus or private meetings with the parties as a last resort measure, only to be done if no other technique was productive.⁴⁰ Later, as many lawyers were trained in mediation, based perhaps on a labor model, the caucus was the primary methodology employed.⁴¹ When discussing the issue today, many conclude that remaining flexible, without a predetermination of the configuration of the parties, is the most effective technique. Also illustrative of evolution is the fact that neutrals have gone from advocating the use of one process over another to recognizing the value of combining processes; that is, using more than one ADR process in the same case.⁴² It is by and through direct experience that the neutral gains the information, familiarity, and

MEDIATION: LAW, POLICY AND PRACTICE § 5.02 (2d ed. 1994).

³⁸ One who represents another in an ADR proceeding is usually in the role of an advocate and is likely an attorney. However, in some instances others such as a financial planner or therapist may attend and represent the party. Hence, the term "representative" is used to indicate inclusiveness.

³⁹ Although mediation has been employed for dispute resolution in the United States since it was established as a colony; see Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, 48 ARB. J. 14 (June 1993); ROGERS & MCEWEN, *supra* note 37, § 5.01. However extensive use in communities and courts is seen as beginning with the Pound Conference in 1976. KOVACH, *supra* note 1, at 21-22.

⁴⁰ CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 263-71 (1984); see also KOVACH, *supra* note 1, at 127-28.

⁴¹ See ALLEN H. GOODMAN, *BASIC SKILLS FOR THE NEW MEDIATOR* (1994); Galton, *supra* note 3, at 33; Kenneth R. Feinberg, *A Procedure for the Voluntary Mediation of Disputes*, in *MEDIATION STRATEGIES: SOLVING BUSINESS, TORT, EMPLOYMENT AND INSURANCE DISPUTES* (ABA ed. 1992).

⁴² For an examination of combining ADR methods, see Jeffrey H. Abrams, *Combined Processes*, in *HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION* 133 (Amy L. Greenspan ed., 2d ed. 1990).

understanding which form the basis of the wisdom for making such modifications to these processes. Experience as a consumer of a dispute resolution process can only add to the individual's knowledge base, and a new perspective may produce even greater transformation.

C. A Peaceful Profession

As dispute resolution evolves as a profession⁴³ and encounters growing pains in the process, conflicts arise. Disputes about "what is mediation" are common, as are disagreements about who or which organization "owns" the field. A few of the issues about which conflicts exist are: whether or not select individuals with specific educational backgrounds are best suited for the profession; what makes a good neutral; and who has the quintessential training. While these disputes often take the form of well-meaning intellectual debate, in some cases the inability to resolve the issues has disenfranchised individuals as well as caused impasses to the work of committees and organizations. Perhaps even more detrimental is the general public's negative perceptions of the profession. Such is apparent in queries such as "How can they help us resolve our dispute when they cannot agree even among themselves?"

Not only does this conflict harm the work of the profession and interfere with the important objectives of increasing awareness and use of ADR, but due to the conflict, dispute resolvers are often unable to see the plethora of interests which they commonly share. If dispute resolution practitioners were to set an example and use an interest-based problem-solving format for their own disputes, the profession would likely recognize many parallel interests. Possibilities include the protection of consumers; establishment of quality standards; professionalism; marketing of services; and education of the general public about peaceful methods of disputing. Unfortunately, methods to jointly achieve many of these interests are overlooked when the parties insist on employing a positional, adversarial, or win-lose approach to conflicts.

By peacefully resolving conflict, those involved in dispute resolution will be better able to demonstrate to others the benefits of collaborative problem solving. Not only will this enable the profession to achieve common goals, but also "walking the talk" sets an example for others who observe the value of the process and see that mediation is indeed a preferable method of dispute resolution. If dispute resolution professionals advocate use of these processes, common sense dictates that they set an example by employing the practices in their own conflict.

⁴³ See *supra* note 10.

III. THE RESEARCH

From the outset, my purpose was to conduct an exploratory study⁴⁴ to aid understanding and serve as a predecessor to more careful inquiry. Examination of mediation and dispute resolution as in-depth research topics is still relatively new⁴⁵ since use of ADR processes in terms of both community⁴⁶ and court-based⁴⁷ disputing has a little over a twenty-year history in the United States.⁴⁸ As the 1970s saw experimentation with ADR in the form of pilot projects,⁴⁹ and the 1980s were a time of proliferation of the implementation of programs in both communities⁵⁰ and court systems,⁵¹ the 1990s have been a time of re-evaluation and attempts at regulation.⁵²

⁴⁴ EARL BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 90 (6th ed. 1992).

⁴⁵ There have been a number of published empirical studies, *see, e.g.*, Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487 (1994); NATIONAL CENTER FOR STATE COURTS AND STATE JUSTICE INSTITUTE, NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH (Susan Keilitz ed., 1994) [hereinafter COURT-CONNECTED RESEARCH] (consisting of discussion on a number of studies); *MEDIATION RESEARCH: AND THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTENTION* (Kenneth Kressel & Dean G. Pruitt & Assocs. eds., 1989) (compendium of research findings from a range of mediation interests). However, the list is minimal in comparison to other professional disciplines.

⁴⁶ Community disputes refer to those types of cases where lawyers are not generally involved as well as centers, often called dispute resolution centers. *See* Kimberlee K. Kovach & Marsha Lynn Merrill, *Community Dispute Resolution Centers* in HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 291-93 (Amy L. Greenspan ed., 2d ed. 1990).

⁴⁷ ADR programs that are affiliated with a court system, either by a continued referral by the court to outside professionals or the presence of in-house neutrals.

⁴⁸ *See* GOLDBERG ET AL., *supra* note 36, at 6-11; KOVACH, *supra* note 1, at 21-23. *See also* Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Volunteerism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 3; ROGERS & MCEWEN, *supra* note 37, § 3.03.

⁴⁹ *See, e.g.*, ROYER F. COOK ET AL., NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT (1980); Edith B. Primm, *The Neighborhood Justice Center Movement*, 81 KY. L.J. 1067 (1992-93).

⁵⁰ Karen Grover Duffy, *Introduction to Community Mediation Programs: Past, Present, and Future* in COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS 21, 26-27 (Karen Grover Duffy et al. eds., 1991); Kovach & Merrill, *supra* note 46, at 292.

⁵¹ *See also* GOLDBERG ET AL., *supra* note 36, at 7-12; Resnik, *supra* note 1, at 218; COURT-CONNECTED RESEARCH, *supra* note 45.

⁵² This is evidenced by a number of ethical codes, also labeled Standards of Practice, which have been enacted in the 1990s. These include THE MODEL STANDARDS OF CONDUCT

Processes and programs were implemented without much discussion of possible ramifications, including legal, ethical and business considerations. At present there is even some reconsideration of the use of ADR,⁵³ though the primary focus is on change or modification through re-design of the methods of ADR practice.⁵⁴ Most of the research has focused on the processes,⁵⁵ effect on courts,⁵⁶ costs,⁵⁷ results,⁵⁸ or parties and their perceptions⁵⁹—and rightly so. Now that more attention is being placed on the neutral—his qualifications,⁶⁰ ethics,⁶¹ background and education,⁶² and

FOR MEDIATORS, drafted jointly by the American Arbitration Association, the Society of Professionals in Dispute Resolution and the American Bar Association Section of Dispute Resolution (April 1994) [hereinafter MODEL STANDARDS]; CENTER FOR DISPUTE SETTLEMENT AND INSTITUTE OF JUDICIAL ADMINISTRATION NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (1992); Florida Supreme Court, PROPOSED STANDARDS OF PROFESSIONAL CONDUCT FOR CERTIFIED AND COURT-APPOINTED MEDIATORS (1992); State Bar of Texas, ALTERNATIVE DISPUTE RESOLUTION SECTION ETHICAL GUIDELINES FOR MEDIATORS (April 1994). Work is ongoing in this area and often includes many of the debates, discussions, and disputes referenced *supra* Part II.C. See also Shaw, *supra* note 10.

⁵³ Resnik, *supra* note 1, at 233. American Bar Association, Reports with Recommendations to the House of Delegates, Report No. 10-F (August 1994), in response to the Court Arbitration Authorization Act of 1993, H.R. 1102, 103d Cong., 1st Sess. (1993).

⁵⁴ See, e.g., Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317 (1995).

⁵⁵ See generally Symposium, *Quality of Dispute Resolution*, 66 DENV. U. L. REV. 335 (1989).

⁵⁶ COURT-CONNECTED RESEARCH, *supra* note 45; Rosenberg & Folberg, *supra* note 45.

⁵⁷ ADMINISTRATIVE CONFERENCES OF THE UNITED STATES TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACTS (Report of ACUS, 1995); Cronin-Harris, *ADR Cost Savings Benefits Studies* (Center for Public Resources 1995).

⁵⁸ Jessica Pearson, *The Equity of Mediation Divorce Agreements*, 9 MEDIATION Q. 179 (Winter 1991). See also Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419 (1989).

⁵⁹ Civil Dispute Resolution Program: A Survey of Program Participants (Research and Development Division, District of Columbia Courts 1992); Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95 (1993).

⁶⁰ Shaw, *supra* note 10; NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS: THE TEST DESIGN PROJECT (1995) [hereinafter TEST DESIGN PROJECT]; Symposium, *Who Really Is a Mediator?, A Special Section on the Interim Guidelines*, 9 NEGOTIATION J. 293 (1993).

⁶¹ Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, J. DISP. RESOL. 1 (1994).

fees and practices,⁶³ the time is ripe to begin researching a number of these "neutral-focused" issues.⁶⁴

A. Goals and Objectives

The goal of this empirical study was to determine the extent to which professional neutrals⁶⁵ utilize mediation and other ADR processes in resolving their own disputes. An ancillary objective of the survey research was to increase awareness and consideration of these alternative processes by those who actively encourage others to participate in them. By receiving, reading, and ideally answering the questionnaire, one would be compelled to at least think about this issue. Consideration may subtly encourage more use of ADR processes by the providers, conduct which should be emphasized—if not required—as later set forth herein.⁶⁶

My loosely formed hypothesis was that while some dispute resolvers applied dispute resolution and mediation principles to their own conflicts, whether personal or professional, the majority of dispute resolvers had still not made the leap. Admittedly, to determine how professional neutrals compare to the general public, a similar survey should have gone to a group of non-neutrals. However, determining a data base would be problematic⁶⁷ although some recent attempts have been made to determine the extent to which businesses are regularly employing ADR processes.⁶⁸ Rather than a

⁶² See N. H. REV. STAT. ANN. § 328-C5 (1995); FLA. R. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS 10.010.

⁶³ MODEL STANDARDS, *supra* note 52.

⁶⁴ Some examination of the neutral has occurred. *But see* Frederic L. DuBow & Craig McEwen, *Community Boards: An Analytical Profile*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES*, 125, 156-64 (Sally Engle Merry & Neal Milner eds., 1993), which examined the impact of mediation on the volunteer mediators; Edward Blumstein & Patricia B. Wisch, *Who Nurtures the Nurturer?, A Model of a Peer Support Group*, *MEDIATION Q.* Spring 1992, at 267; and Eric R. Galton, *Mediators and Stress: Caring for the Caretakers*, paper presented at National Conference on Peacemaking and Conflict Resolution (May 30, 1995) (on file with the author), which was concerned with the mental health of the mediator.

⁶⁵ Loosely defined as individuals whose primary livelihood and career focus is on the teaching, training, administration, or practice of one or more ADR processes.

⁶⁶ See *infra* parts IV, VI.

⁶⁷ Lawyers are an unlikely control group as their training emphasizes an adversarial approach to disputing. It is likely no single profession could be used due to other variations in training and problem-solving approaches. Perhaps a likely group would be a random sampling of Middle America, as defined by the Gallup Poll.

⁶⁸ Researchers indicate that those who have pledged a commitment to use ADR

comparison study,⁶⁹ the research thus sought to measure the degree to which dispute resolution professionals used the processes themselves.

At present, some jurisdictions demonstrate use of ADR more than others and consequently have a tendency to be more knowledgeable about the processes as well as experienced in their use. Therefore, I decided a national sample would be better than a local one. I also wanted an interdisciplinary sample although far more lawyers than non-lawyers responded.⁷⁰ The two largest organizations of neutrals of which I am aware—the Society of Professionals in Dispute Resolution (SPIDR) and the American Bar Association Section of Dispute Resolution—were identified as the sample⁷¹ and mailing lists obtained.

I had also hoped to ascertain whether or not correlations existed between the duration of a neutral's ADR practice and his use of the processes. One theory was that the longer the time in practice, and hence the greater familiarity with ADR, the more likely a dispute resolver would see the application to himself. I also hypothesized that non-legally educated individuals might be more apt to desire and use ADR than lawyers. While I had no preconceived idea about the outcome, I was also interested in finding out whether individuals were more likely to see the relevance of mediation in their professional business matters or (to their) personal conflicts.

While this study has provided some initial information, additional knowledge and dialogue are necessary. Nonetheless, the theme of this piece, which suggests that ADR use begin first and foremost with the providers, has strong implications regarding the importance of practical experience as a segment of the educational or qualification process for dispute resolvers.

B. Methodology

The questionnaire,⁷² along with a self-addressed, stamped envelope, was mailed to over six thousand individuals. The first eight questions of the survey asked for general information about the individual's background. The next several inquiries were about the individual's present use of ADR, and the final few questions were concerned with future use and general orientation. A few of the questions were contingent upon previous

processes such as the Center for Public Resources Pledge do not actually use ADR as held out. Judith P. Ryan & Stephen M. Cheeseman, *The American ADR Landscape: A Canadian Perspective* [Presentation, ABA Annual Meeting, Aug. 7, 1995].

⁶⁹ Such a study would, however, be an appropriate follow-up research topic.

⁷⁰ See *infra* note 76 and accompanying text.

⁷¹ See *infra* notes 74-75 and accompanying text for additional detail.

⁷² See *infra* Appendix.

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answers⁷³ and were generally answered as such although some overlap in responses occurred. In retrospect, the questionnaire may have included too many questions with too many options, and, admittedly, interchanging the terms mediation and ADR may have been confusing. However, as this was purely an exploratory project and hopefully a catalyst for additional research, the data has proven useful.

Since many individuals are members of both target organizations, an attempt was made to avoid duplicate mailing. Nearly 1400 responses were received, which translates to an approximate 23% rate of return. A few responded not specifically to the study, but rather provided information about their own programs.⁷⁴ The responses were documented as coming from all states except for New Hampshire and West Virginia, as well as the District of Columbia, Puerto Rico and the Virgin Islands. From a demographic perspective, I expected to receive the greatest number from California, Florida and Texas, because reputationally, these states are known as leaders in terms of dispute resolution activity, especially in court-related matters. In fact, the most responsive states were Texas, California, New York, and Florida, respectively.⁷⁵ This was not surprising, due to ADR activity and the greater likelihood that individuals in those states would be members of the two targeted organizations.

With regard to the respondents' background, 73% were identified as lawyers, with the remaining 27% not legally educated. Though not exact, these percentages approximate the constituency of the mailout.⁷⁶ The lawyer/non-lawyer factor is one variable which is considered and compared in some of the responses.⁷⁷ It was not possible to determine how many

⁷³ BABBIE, *supra* note 44, at 154.

⁷⁴ Therefore, in each area of inquiry the numbers differ; thus, all responses will be described in terms of percentages.

⁷⁵ Texas was clearly most responsive with 15% of all responses, likely due not only to the popularity of ADR, but also because it has been my home state for over 15 years, during which I have been active in ADR. Eleven percent of the responses were from California, with 6% from New York and 5.8% from Florida.

⁷⁶ Of the ABA Section of Dispute Resolution current membership, approximately 78% are lawyers, with about 13% non-lawyers or associate members, with the remainder being law student members. [Telephone conference with Mark Donberger, former Associate Staff Director, ABA Section of Dispute Resolution, July 21, 1995.] SPIDR membership is more interdisciplinary with between 50-60% lawyers. [Telephone conference with Susan Gombert, Membership Director, SPIDR, July 26, 1995.]

⁷⁷ I recognize that many dispute resolution professionals do not like the lawyer/non-lawyer dichotomy and in particular the use of the term "non-lawyer," as it appears negative and serves to polarize the groups. However, it is an easily determined variable and one I predicted would be germane to the data. It is also particularly relevant for those in legal

respondents were specifically engaged in the practice of ADR as opposed to those who were involved from the standpoint of an advocate or other representative,⁷⁸ teacher, trainer, program or project administrator, or even regular client-participant⁷⁹ in ADR proceedings.⁸⁰ However, from the response to the inquiry of the number of disputes mediated or arbitrated within the past six months, it appears that only a small number are acting as a neutral on a full-time basis.⁸¹

Not all of the results will be discussed here, nor will there be a complete analysis of proposed or inferred implications from the data.⁸² Moreover, as not all respondents answered all questions, the total response to each question differs. Thus, percentages will be used rather than raw data. Part C consists of the report of the data, while Part D follows with some analysis, discussion, and attempt at interpretation. The discussion will be limited to obvious inferences drawn from the results. The data will be examined using only univariate (or descriptive) and bivariate (or relation-between-the-variables) analysis.⁸³ Quickly one realizes that a myriad of causes for the correlations may exist.⁸⁴ Subsequent studies and analyses, perhaps with a smaller and more manageable number, might identify additional variables for comparison.

C. Results

A surprising number of individuals responded that they have been parties to a mediation—38.5% of those answering the question. However, since 72% of those who responded as having participated are attorneys, it is possible that the participation was in a representative capacity, even though the question was asked whether participation was as a party.⁸⁵ In fact, a few

education who teach dispute resolution methods.

⁷⁸ The word "representative" is utilized as an acknowledgment that other professionals in addition to attorneys may represent parties in an ADR proceeding, particularly mediation. See KOVACH, *supra* note 1, at 77-79, 90.

⁷⁹ As distinguished from regular representative participant, *e.g.*, a lawyer.

⁸⁰ Examples of regular client-participants in ADR are business managers or human resource personnel in the context of employment-related disputes and insurance adjusters in tort matters.

⁸¹ In response to Question VI, only 18% recorded having mediated over 25 cases in the last six months.

⁸² I recognize that missing data can influence the responses, and thus will make only general conclusions.

⁸³ BABBIE, *supra* note 44, at 397-98.

⁸⁴ *Id.* at 389-90, 397-98.

⁸⁵ "XIII. Have you been a party in mediation to resolve a dispute with a third [sic] party

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respondents included comments next to the answer that participation was in a representative capacity. Apparently a few respondents read the term "party" more generally and indicated by comments that they were in the role of neutral. Of those who participated, 77% reported that an agreement was reached as a result of the process, and 82% were either satisfied or very satisfied with the process.

Over 15% of the respondents did not answer the question in regard to business practices and dispute resolution clauses.⁸⁶ This may be because many do not work for someone else, as a few noted beside the question, or do not have formal business agreements. Even so, it is likely that a dispute resolver enters into some type of contract. For example, solo practitioners are likely to have lease agreements and support staff. Of those who responded to the question, nearly 35% answered in the affirmative, indicating the presence of ADR clauses, leaving just over 65% with the "no" response. Of those answering "yes," 68% are identified as attorneys while 32% are not. The percentage of attorneys, however, was greater, at 74%, of those responding in the negative.

Of those answering question XII, regarding disputes in the workplace, a somewhat surprising 43% stated that workplace disputes were mediated. Of those responding "yes," 64% were lawyers with 36% non-legally trained. On the other hand, of those stating that workplace disputes were not mediated, 78% were lawyers. One concern with this query, as a few individuals noted by their comments, is that I did not define "mediation."⁸⁷ Of course, even with a specific definition, some may see informal collaborative problem solving in a hallway as mediation while others may not define the process as mediation until an individual from outside the workplace, who is paid a fee, sits down with the parties.

While a number of questions looked at the individual's past and current history with regard to ADR use, the latter questions asked about the possibilities for use of ADR in the future. Question 19 attempted to determine the importance of including an ADR clause in a contract. Only 7.7% responded that they did not care whether a contract which they were considering contained such a provision. The majority, 73.7%, stated that they would suggest that an ADR clause be included, but its absence would not be a barrier to signing the contract, while 18.6% of those responding would insist on the inclusion of such a clause, with their refusal to sign a

or business?"

⁸⁶ "X. Does your partnership, business agreement or other work activity include a mediation or dispute resolution clause?"

⁸⁷ For a variety of definitions, see KOVACH, *supra* note 1, at 16-17. See also Carrie Menkel-Meadow, *supra* note 4, for a discussion and comment of the myriad approaches to the mediation process.

consequence of the omission. Interestingly, of those who did not care or would only suggest inclusion, the response was similar to the respondent sample, with 78.7% being lawyers. However, of those who would insist on inclusion or forego the contract, 41% were in the non-lawyer group, with only 59% lawyers. The following question assumed the respondents were insisting on ADR and inquired about the process of choice. Of those responding, 78.7% chose mediation, with 18.7% electing arbitration and 2.6% choosing "other." Selecting mediation were 72% lawyers, while arbitration had 73% lawyers. However, of those choosing the other category, 86% were lawyers.

The final two inquiries were an attempt to determine whether mediation is used generally and, in particular, discern whether use is more prevalent in business or personal affairs. The concern about this query is the inclusion of "sometimes," which response the majority chose, and without more, is not very informative.

Question XXIII inquired as to whether one applies mediation in personal affairs and provided three choices: always, sometimes, and never.⁸⁸ Only 17% of all respondents stated that they always apply mediation, whereas the majority of respondents, 78%, stated that they sometimes do, with only 5% stating never. However, several changed the "sometimes" to "usually." Occasional comments noted the benefits gained from the use of mediation with one's family members. Fifty-two percent of those claiming application in every instance were not lawyers. Question XXIV, asking about the application of mediation in business matters, surprisingly had more responses than the prior question. The majority, 74%, again opted for the middle-of-the-road approach of sometimes, with only 3% stating that mediation was never applied in their business affairs. Of the 23% who always applied mediation in business matters, only 48% were lawyers. The number of years in the dispute resolution field appears to influence the response. Of those who responded "always" to either Question XXIII or XXIV, 8% had one to two years experience in ADR; 11.5%, three to four years; 18%, five to ten years; 22% over ten years. Even though the span of years is broader for the last two choices, there is still an indication that the greater the experience level, the greater the likelihood for personal application of the processes.

D. Analysis

Generally, and, I suppose, not unexpectedly, most responses fell within the middle ground. Dispute resolvers sometimes use ADR but perhaps do not embrace its use to the degree they request others to do so. Although we

⁸⁸ See Question XXIII, Appendix.

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remain unclear about how these results contrast with the general public's use of ADR, I surmise that there is more ADR use by the practitioners. Nonetheless, a follow-up comparison survey would be useful. From the data on those who have used mediation, it appears that neutrals fare similarly to others in regard to settlement rates (77%). Other studies have shown settlement rates in ranges of 54-65% and 85% in small claims courts,⁸⁹ and 70% at neighborhood justice centers.⁹⁰ The neutrals' satisfaction with the process at 82% also fell within the same range as the general public, as mediation has been documented as resulting in satisfaction 70-75%⁹¹ and 80-89% of the time.⁹²

Where the responses affirmatively indicated existent mediation use in business, either in a contract (Question X) or mediating in the workplace (Question XII), the percentage of lawyers was less than the sample. Thus, it appears that the lawyers are currently experiencing greater difficulty than those without a legal education in seeing the application of these processes to themselves. This fact is consistent with my personal observations. Even more telling are the responses to the questions about future use. Of those who replied that if negotiating a contract they would absolutely insist on including an ADR clause or would not sign the contract, 41% were non-lawyers. Moreover, as to current application, of those who always apply mediation principles in their personal lives, 52% were non-lawyers. In business matters, the percentage of those who always applied mediation was identical—52% non-lawyers. Therefore, it appears that non-legally trained individuals are much more likely to see the relevance, appropriateness, and hence application of mediative and collaborative problem-solving principles in both personal and professional matters than lawyers. Perhaps this is due to being more open initially. In other words, these individuals enter dispute resolution absent the adversarial, win-lose approach to problem solving still so prevalent in our justice system and legal education, which is emphasized by lawyers and reinforced by courts.

In general, the results are not surprising although the "never apply" response, indicating that individuals see no application of mediation to themselves, is somewhat perplexing. Other recent attempts at ascertaining ADR use have found that the use of ADR is low but on the increase in corporate legal departments.⁹³ Moreover, since the rate of return was

⁸⁹ John A. Goerd, *How Mediation Is Working in Small Claims Courts*, JUDGES J. Fall 1993, at 12, 47.

⁹⁰ Primm, *supra* note 49, at 1072.

⁹¹ COURT-CONNECTED RESEARCH, *supra* note 45, at 9-10.

⁹² ROYER F. COOK, NATIONAL EVALUATION OF THE NEIGHBORHOOD JUSTICE CENTERS 5 (1980).

⁹³ Coopers Lybrand Study for JAMS/Endispute, reported at 6 WORLD ARB. & MED.

relatively small, whether the other 77% of professional dispute resolvers are more or less likely to "walk the talk" is unknown.⁹⁴ My original theory, based upon the proposition⁹⁵ that lawyers who are trained in an adversarial method of problem-solving would be less likely than others to see the use of ADR, and in particular mediation, for themselves has been substantiated by the data. The paradigm of a win/lose method of dispute resolution still exists, and must, I suppose, remain intact and available for some conflicts.⁹⁶ But the essence of ADR, the availability of many options, is a very different paradigm. Some authorities are concerned that ADR, rather than shifting the adversarial paradigm toward collaboration, has itself become too "legal."⁹⁷ Others call for a focused return to the underlying theory and purpose of mediation, such as empowerment of the parties.⁹⁸ Perhaps objectives such as party satisfaction, empowerment, and ownership have all but vanished as settlement becomes paramount. Yet, ADR exists within the legal system. Bar associations, law schools, and courts have been visible leaders in urging the use of ADR. A focus on the resolution of lawsuits does not necessarily exclude the other virtues of the processes. But if ADR is to endure as a genuine, viable alternative with all its attendant objectives met, then the paradigm of dispute resolution must shift. Evidence of such a shift must come from those advocating ADR. Walking the dispute resolution talk exhibits a shift, and lawyers must take part. Use of ADR must be demonstrated and reinforced. If those within the dispute resolution profession want others to use ADR, illustration of its applications ought to begin with them.

IV. IMPLICATIONS OF MANDATORY MEDIATION FOR MEDIATORS

A. For Teaching and Training

In ADR-related education, few established teaching or training requirements exist.⁹⁹ Attempts at regulating training are now being made

REPORT 120 (1995).

⁹⁴ Statisticians may contend that those likely to answer in a positive manner are more likely to respond. A few respondents cautioned similarly.

⁹⁵ Based upon what was known prior to this study. See BABBIE, *supra* note 44, at 59.

⁹⁶ However, concern has been expressed that the court system as a method of dispute resolution may no longer be viable. Resnik, *supra* note 1, at 262, 265.

⁹⁷ Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 17 (1991).

⁹⁸ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994).

⁹⁹ While over a hundred statutes addressing mediator qualifications exist, they vary in

through examination of the credentialing process.¹⁰⁰ Concerns about the quality and competence of the providers of dispute resolution services also place attention on the education process. Yet there is little, if any, consensus about what specifically qualifies one to be a mediator¹⁰¹ or dispute resolver.¹⁰² Unfortunately, SPIDR's Commission on Qualifications latest report asks more questions than it answers.¹⁰³ And even when stated, training requirements are nebulous. For example, in Texas, an attempt was made to establish an approved curriculum for the statutorily referenced 40-hour training, which implies application to all neutrals,¹⁰⁴ but in practice has been applied only to mediators. A mediation trainers' roundtable was formed.¹⁰⁵ While a variety of issues were discussed and agreements reached on many, the group was unable to reach consensus on the meaning of the term "classroom" in the statute.¹⁰⁶ Although Florida attempted to standardize training by establishing a program to certify training,¹⁰⁷ most jurisdictions are just beginning to focus on these issues.

If dispute resolution is to survive and flourish as a profession, specific qualifications must be determined. The existence of specific qualifications is the norm with any profession.¹⁰⁸ As requirements for licensure or certification are established, related matters must also be decided.¹⁰⁹ These include issues such as entry requirements, core curricula, and evaluation

content. Most focus on educational degrees obtained and a predetermined number of hours of training and experience. ROGERS & MCEWEN, *supra* note 37, § 11.02. Some focus has now shifted to assessment of skills. See TEST DESIGN PROJECT, *supra* note 60.

¹⁰⁰ See *infra* notes 109–116 and accompanying text.

¹⁰¹ ROGERS & MCEWEN, *supra* note 37, §§ 11.01, 11.02.

¹⁰² See SPIDR Report, *supra* note 10; see also Margaret Shaw, *Selection, Training and Qualification of Neutrals*, in COURT-CONNECTED RESEARCH, *supra* note 45, at 152–68; Joseph B. Stulberg, *Training Intervenors for ADR Processes*, 81 KY. L.J. 977 (1992–93).

¹⁰³ SPIDR Report, *supra* note 10.

¹⁰⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 154.052(a) (West Supp. 1996).

¹⁰⁵ Texas Mediation Trainer Roundtable consisted of those individuals who held themselves out as mediation trainers. See THE TEXAS MEDIATION TRAINER ROUNDTABLE ANNOTATED STANDARDS FOR THE 40-HOUR BASIS MEDIATION TRAINING IN TEXAS 1 (1994).

¹⁰⁶ *Id.* at 8. Section 154.052(a) specifically states: "Except as provided by Subsections (b) and (c), to qualify for an appointment as an impartial third party under this subchapter a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques . . ."

¹⁰⁷ See FLA. R. FOR CERTIFIED COURT-APPOINTED MEDIATORS R. 10.010.

¹⁰⁸ Edward F. Hartfield, *Qualifications and Training Standards for Mediators of Environmental and Public Policy Disputes*, 12 SETON HALL LEGIS. J. 109, 110 (1988).

¹⁰⁹ See SPIDR Report, *supra* note 10; ROGERS & MCEWEN, *supra* note 37, § 11.02.

methods.¹¹⁰ There is general consensus that personal qualities are important along with mediation and negotiation experience, subject matter knowledge, training and formal education.¹¹¹ Although acknowledged as difficult to assess,¹¹² these attributes tend to nevertheless be indicia of performance.¹¹³ Also, while somewhat innate, the qualities can evolve with mediation experience.¹¹⁴ Although difficult, attempts are being made to establish and measure mediator competencies.¹¹⁵

However, as dispute resolution professionals attempt to determine those qualifications and competencies which will define the practitioner, the learning process must be considered in greater depth.¹¹⁶ Compared with other professionals, dispute resolvers undergo very little formal education and training. Analysis of teaching methodologies is also lacking. As attention is directed to competency, learning must be addressed. Learning is defined as "changes in perception and behavior resulting from experience,"¹¹⁷ and is said to be an internal process.¹¹⁸ Historically, learning was examined in terms of pedagogy—literally translated, the art and science of teaching children.¹¹⁹ Additional inquiry and study encountered differences in how adults learn, and the theory of andragogy or adult learning was established.¹²⁰ Underlying premises of andragogy include

¹¹⁰ SPIDR Report, *supra* note 10; KOVACH, *supra* note 1, at 206-09.

¹¹¹ Shaw, *supra* note 10, at 129.

¹¹² *Id.* at 130.

¹¹³ COURT-CONNECTED RESEARCH, *supra* note 45, at 158.

¹¹⁴ Shaw, *supra* note 10, at 130.

¹¹⁵ TEST DESIGN PROJECT, *supra* note 60.

¹¹⁶ For example, the Society of Professionals in Dispute Resolution [hereinafter SPIDR], the largest international, interdisciplinary organization of individuals involved in dispute resolution, has taken a lead in exploring the measure of competence or quality of dispute resolvers. SPIDR has published two reports: in 1989, Commission on Qualifications, Society of Professionals in Dispute Resolution, Qualifying Neutrals: The Basic Principles (1989), and the second, SPIDR Report, *supra* note 10. The Section of Alternative Dispute Resolution of the State Bar of Texas has also been studying the subject, and a draft report was issued in June 1995. QUALITY OF PRACTICE TASK FORCE OF THE ADR SECTION, STATE BAR OF TEXAS, PROPOSAL FOR A VOLUNTARY PROGRAM FOR MEDIATORS' DESIGNATION CERTIFIED BY THE ALTERNATIVE DISPUTE RESOLUTION SECTION OF THE STATE BAR OF TEXAS. See also TEST DESIGN PROJECT, *supra* note 60. None of these works, however, considers the educational process and how specific skills and competencies are learned.

¹¹⁷ Ruth R. Middleman & Gale Goldberg Wood, *Helping Students Learn From Each Other*, J. TEACHING SOC. WORK, 1991, at 31, 32.

¹¹⁸ KNOWLES, *supra* note 23, at 55-56.

¹¹⁹ *Id.* at 40.

¹²⁰ *Id.* at 42.

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the following: adults see themselves as self-directive;¹²¹ they accumulate more experience by which they define themselves and which provides great resources for learning;¹²² there are developmental tasks which must be mastered and which affect readiness to learn;¹²³ adults are involved in self-diagnosis of learning needs;¹²⁴ and, lastly, adults seek to apply learning in a practical manner.¹²⁵ In essence, the more active the adult learner is in the process, the more effective the learning.¹²⁶ In fact, experience of the learner is seen as the central dynamic of the learning process.¹²⁷ Hence, experience is essential. In the context of ADR education, if a neutral were to experience an ADR process in different roles from varying perspectives, the greater her resultant experience base and, ergo, the learning.

Consistent with the principles of androgogy, it has been noted that the ultimate education is to educate one's self.¹²⁸ Concomitant with self-education is the development of the reflective practitioner. In educating professional practitioners, be they therapists, lawyers or physicians, the individual must take the time to reflect on past actions in order to continue development, particularly with professional judgments.¹²⁹ Not only is self-evaluative feedback essential,¹³⁰ but methods which involve the individual most intensely in self-directed inquiry produce the greatest learning.¹³¹ As a mediator begins to integrate the principles of mediation into her behavior, not just when she is in the role of a neutral, but in all roles, she develops a more complete understanding of the process. As a consequence, mediative or facilitative action and behavior will become more automatic. Added opportunity for reflection is provided. As she then reflects on those actions, a more aware and competent practitioner results.¹³² Moreover, requiring a student of mediation to mediate her own conflict also provides the student with an additional practical application of the process, an experience also conducive to adult learning.¹³³

Many of the educational institutions, classes, and degree programs in

¹²¹ *Id.* at 47.

¹²² *Id.* at 49-50.

¹²³ *Id.* at 51.

¹²⁴ *Id.* at 47.

¹²⁵ *Id.* at 50.

¹²⁶ *Id.*

¹²⁷ *Id.* at 56.

¹²⁸ Middleman & Wood, *supra* note 117.

¹²⁹ SCHÖN, *supra* note 30, at 39-40.

¹³⁰ *Id.* at 22-40.

¹³¹ KNOWLES, *supra* note 23, at 56.

¹³² SCHÖN, *supra* note 30, at 36.

¹³³ See *supra* note 125 and accompanying text.

dispute resolution require observation of the mediation process. While observing the activity or skill is beneficial to learning and should be mandatory in any formalized standards established for education in professional skills, an observation, by its nature, is from a detached point of view. Some mediation training programs go a step further and require supervised experience; the novice mediates under the supervision of a teacher/trainer or more experienced practitioner. This process of supervised experience resembles the clinical education component of law, medical, health care, and other professional schools. This should also be a required part of any education or qualification standards established for the dispute resolution field. However, to fully understand the process from the other side, that is, the parties' view, a mediator or other neutral must experience the process for herself. The best education is one which provides opportunity for knowledge from all perspectives, including an internal and subjective view. Enlightenment gained from this experience will help the neutral understand the actions of the participants.

Moreover, the objective of clinical, skills and experiential education is not only to teach students to evaluate their own work, but also to critically assess the work of others.¹³⁴ While a critique of other neutrals can take place through observation, if the critiquer is completely involved in the process, the feedback is likely to be more accurate.¹³⁵ Even though trainees act as disputants in role plays and provide critiques to the neutral, it is not reality. Simulations often fail to provide the excitement, motivation and unpredictability of real life situations.¹³⁶ Not that the role plays with trainees should be discontinued, but trainers should supplement them with actual experience as a disputing party. This could be done in a variety of ways. For example, prior to enrolling in a mediation or other dispute resolution course, the student could be required to resolve her own conflict through the very process she desires to study. Another option would require each trainee, either during or shortly after the training, to bring to the training group a dispute that she is engaged in. Although difficulty may arise in terms of persuading the other party (the non-trainee disputant) to attend, this too could be instructional. The trainee neutral party would gain understanding about the difficulties encountered with participant reluctance.

If these cases were mediated by the novice mediators, additional benefits may evolve. For example, if a disputant is truly in a conflict, she will be able to give more reliable feedback to the mediator trainee. This additional evaluation can be instructional. Moreover, the feedback may be

¹³⁴ Nina W. Tarr, *The Skill of Evaluation as an Explicit Goal of Clinical Training*, 21 PAC. L.J. 967, 967 (1990).

¹³⁵ Arguments can, however, be made to the contrary. See *infra* Part V.

¹³⁶ Leonard D. Pertnoy, *Skills Is Not a Dirty Word*, 59 MO. L. REV. 169, 171 (1994).

better received since it would be coming from a peer. Individuals are often resistant to supervisor-only feedback.¹³⁷

In the learning process, the experience can either be preceded or followed by the consideration of theory and discussion.¹³⁸ Although it is generally agreed that experience is a crucial component of the learning process, particularly with adult students,¹³⁹ there exist varying theories for its use.¹⁴⁰ Perhaps now is the time to experiment. To enhance learning, encourage the experience to be as broad and inclusive as possible, particularly in light of the call for broader approaches to the mediation process generally.¹⁴¹ As the profession struggles with establishing mediator education and training requirements, consideration of clinical and experiential elements of education is essential. In fact, practical experience through observation, and participation as a neutral, observed by an experienced practitioner, must be part of any credentialing process established. Direct participation as a disputant would be a most beneficial addition to the experiential education component. As demonstrated by the data, continued exposure and experience are even more critical for those individuals who are currently (law students), or were previously (lawyers), trained in the adversarial method of dispute resolution.

B. Benefits to Court-Annexed Systems of ADR

As more courts became users of dispute resolution and referred cases to ADR processes, particularly arbitration and mediation, a need for individuals to serve as third party neutrals arose. Many of those individuals who have been trained and who serve as mediators and arbitrators in pending litigation are lawyers. Yet these same lawyers, while advocating the use of dispute resolution by courts, are often hesitant to go to ADR in cases in which they serve as an advocate. Judges still observe reluctance in voluntary agreements to participate in dispute resolution and hence mandate its use.¹⁴² But as the use of mediation increases and in some jurisdictions becomes mandatory,¹⁴³ lawyers will be forced to mediate their own cases,

¹³⁷ Tarr, *supra* note 134, at 979.

¹³⁸ Hoberman & Mailick, *supra* note 18, at 193.

¹³⁹ See *supra* notes 122-27 and accompanying text.

¹⁴⁰ Mark Tennant, *The Psychology of Adult Teaching and Learning*, in ADULT EDUCATION 197 (John M. Peters & Peter Jarvis & Assocs. eds., 1991).

¹⁴¹ Menkel-Meadow, *supra* note 4, at 225.

¹⁴² While I recognize that there is a wide array of opinions with regard to process, type of case and voluntary versus mandatory referral, the examination of those issues is beyond the scope of this paper. For a thorough analysis of these issues, see Katz, *supra* note 48.

¹⁴³ A number of jurisdictions now require litigants to participate in some form of ADR.

that is, cases in which they represent a party. The advocate's role in, and influence upon, the process can be vital.¹⁴⁴

It has been noted that a litigant's attorney has a significant role in influencing the client's attitude, including as to ADR.¹⁴⁵ This is of particular import, unless or until the general public is well versed in ADR. Whether, and how, disputing parties access ADR may very well depend upon the lawyer's predisposition. In addition, personal experience has proven to be significant in attorneys' ability to inform and prepare clients for ADR.¹⁴⁶ If lawyers are required to mediate cases in which they represent others as well as their own disputes, a greater consciousness of these processes will result. By experiencing their own conflicts, lawyers may be more sensitive to, and empathetic with, their clients. For even if a lawyer does not aspire to be a professional dispute resolver, as that term has been used here to indicate a third party neutral, in essence he serves in a problem-solving role for his client.¹⁴⁷ As such, it is imperative that he be aware of the various methods available to solve problems. It is just a matter of changing, as Professor Leonard Riskin pointed out, the lawyer's philosophical map.¹⁴⁸ Direct experience in ADR procedures will enhance the lawyer's repertoire of problem-solving skills.

For example, lawyers who volunteer as neutrals for settlement week, if practicing as an adversary at all, are often compelled to submit to a settlement week process at least one case in which they serve as an advocate. Therefore, the same person is seen as an advocate and as a neutral at the courthouse over several days. Accordingly, they participate from both viewpoints. Those who experience the dual roles report it to be educational; new insight into the process is realized. This experience enhances the lawyer's competencies—not only as an advocate, but also as a dispute resolver.

A requirement of ADR participation can also assist participants in dealing with other issues of court-mandated dispute resolution. Much of the

For example, CAL. FAM. CODE § 3170 (West 1994); REV. CODE WASH. § 7.70.110 (1994); S.D. FLA. L. R. General Rule 16.2; see generally Katz, *supra* note 48.

¹⁴⁴ For a discussion of the lawyer's role in the process, see McEwen, Rogers & Maiman, *supra* note 54, at 1351–95. See also GALTON, *supra* note 3.

¹⁴⁵ Rosenberg & Folberg, *supra* note 45, at 1541.

¹⁴⁶ *Id.* at 1542.

¹⁴⁷ Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993). See also Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: The Lawyer As Mediator*, 81 KY. L.J. 1165, 1168–69, 1176 (1992-93).

¹⁴⁸ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982). See also Zerhusen, *supra* note 147, at 1175.

dispute resolution activity in the courts has resulted from the courts' urging.¹⁴⁹ If lawyers were required to commit to using ADR, the court's intervention would be lessened. ADR use would increase and become the norm. At some point, ADR may even become automatic, as part of pre-trial procedure. While this is beginning to occur in some jurisdictions, establishing a requirement that lawyer-mediators must mediate their own cases may accelerate the process. Although participation as an advocate differs from mediating one's own conflict, such experience would support court-related dispute resolution in two distinct ways. First, the advocates would be setting an example for other lawyers and litigants. Second, the participation provides additional opportunities for experience and learning hence, increasing the lawyer's competence as a neutral or as an advocate in dispute resolution.

C. For the Process and the Profession

Every new profession will no doubt experience growing pains.¹⁵⁰ And while debate and discussion can be healthy and productive, if conflict is allowed to fester unresolved, it can also be destructive. In terms of dispute resolution, great strides have been made in terms of its use. Yet when the time arrived to go to the next level, to become established and legitimized as a profession, with all attendant features such as regulation by licensure or certification, ethical duties and grievance procedures, dispute resolvers have fallen short. Admittedly, some of the resistance is predicated on concerns of limiting the skills and creativity which comprise the profession.¹⁵¹ Difficulty is also due to the inability to reach decisions. In fact, the conflict about some of these issues has not only not been resolved, but it has spilled over into other issues. Individuals become so positioned that they refuse to work with one another. Needless to say, this example cannot encourage the general public to utilize ADR. But if these matters could be resolved by mediation or other dispute resolution procedures, this could serve as a convincing illustration for the legal profession as it, too, comes to grips with its own struggles during a time of tumultuous change.¹⁵² I was pleased

¹⁴⁹ See generally Katz, *supra* note 48.

¹⁵⁰ Recently professionals such as counselors and engineers have experienced difficulties in terms of establishing regulations and professional parameters.

¹⁵¹ SPIDR Report, *supra* note 10, at 1.

¹⁵² The idea of holding a facilitated symposium where decisionmakers in the legal system would come together to address divisive issues facing the profession such as tort reform and advertising was the notion of Judge Frank G. Evans (retired), Director of the Center for Legal Responsibility, South Texas College of Law. The process would be similar to consensus building and utilize individuals functioning in a facilitative role.

by one comment included in the survey, where a local dispute resolution center was immersed in conflict and sought the assistance of a neutral mediator from a nearby program. The matter was resolved satisfactorily.¹⁵³

Moreover, as previously pointed out,¹⁵⁴ ADR processes can be positively modified, just as our system of justice is continually changed by statutory and other rule changes and case law. For example, mediation is still without precise definition. Very different visions of what mediation is not only cause disagreement and debate, but directly affect perspectives of training, qualifications, ethics, and regulation,¹⁵⁵ the very issues which the mediation community is trying to determine. Rather than continued advocacy of the different views, perhaps a mediation-like approach would lead to consensus or, at a minimum, increased understanding. If the neutral responsible for implementing the process could experience the process in a different manner, additional innovations might result. For example, relating to the "always caucus" versus the "never caucus" views of the mediation process,¹⁵⁶ if the mediators who held these strong views had been mediated themselves they may have discovered through the experience the need for the other method. As a consequence, the inclination to be more flexible in the approach could have resulted.

Unfortunately, there is not any award-winning television program entitled *Minneapolis Mediation* or the like. The idea of mediation or ADR has still not become an automatic response to conflict in the consciousness of America.¹⁵⁷ Until a time where individuals are so conditioned, dispute resolvers must go about marketing their services. If the processes are used by the practitioners, and the profession is seen as a collaborative, synergistic enterprise, it is more capable of reaching its goals.

Mediators who mediate their own conflicts will no doubt be more sensitive, empathetic and knowledgeable about the process, and moreover will be more persuasive in advocating its use by setting an example. Mediators are also seen as teachers, although the perception of the subject of their instruction ranges from the law¹⁵⁸ to the negotiation process.¹⁵⁹ If the parties look to the mediator as a teacher of sorts, a great opportunity is provided for instruction in problem-solving and negotiation. Mediators with

¹⁵³ Questionnaire on file with author.

¹⁵⁴ See *supra* Part II.B.

¹⁵⁵ ROGERS & MCEWEN, *supra* note 37, § 2.04.

¹⁵⁶ See *supra* notes 40-41 and accompanying text.

¹⁵⁷ See Wirthlin Group, National Survey Findings on Public Opinion Toward Dispute Resolution (National Institute of Dispute Resolution, 1992).

¹⁵⁸ Bohmer & Ray, *supra* note 12, at 116-17.

¹⁵⁹ Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn From Mediation*, 56 MOD. L. REV. 361, 378 (1993).

disputant experience can relate better to the parties and learning will be enhanced.

V. CONCERNS AND CRITICISMS WITH MANDATING DISPUTE RESOLUTION FOR DISPUTE RESOLVERS

Establishing a requirement that a mediator must mediate his own dispute, or that an arbitrator must subject his matter to arbitration, as a prerequisite to licensure, certification, or other qualification criterion, is not without criticism. Despite all of the alleged benefits to be gained in terms of the learning process,¹⁶⁰ it would be naive not to recognize potential difficulties. These include loss of neutrality and development of bias, exaggerated criticism of the neutral, administrative challenges, overuse or dependency upon the process, and the myriad of problems associated generally with mandatory mediation.

A mediator involved in a mediation for herself is clearly biased. If complete understanding of the other viewpoint existed, there would be little need for the neutral. A concern, however, is whether this biased view of the matter can carry over to a mediation or arbitration the individual later conducts, where similar facts and circumstances exist. Ideally, the mediation process, which encourages the parties to see and appreciate the other side's view, would lessen the bias. However, the tendency to see and identify with the viewpoint of one with like views even in a different matter is part of human nature.¹⁶¹ But all neutrals have opinions and biases. Each person has been involved in conflict. The good dispute resolution practitioner, whether arbitrator, mediator, case evaluator or other type of neutral, is able to put aside predilection and approach each matter in an impartial manner. And if matters arise which are unable to be viewed impartially, as in any process the third party would abstain from serving in the neutral role.

Another neutrality-related difficulty concerns the perception of the non-ADR-educated party. For example, in a mediation context, if an individual is aware that the other person with whom a dispute exists is also a mediator, he may think that the mediator will be biased in favor of the party-mediator. This perception should be dealt with as are other issues of potential bias, by the assurance of complete neutrality.

Participation of dispute resolvers as parties might lead to overstated criticism. Critiques of neutrals are often difficult since the parties and

¹⁶⁰ See *supra* Part IV.A.

¹⁶¹ This often stems from the need for consistency between beliefs and decision-making, termed *cognitive dissonance*. See ERNEST R. HILGARD, RICHARD C. ATKINSON & RITA L. ATKINSON, INTRODUCTION TO PSYCHOLOGY 529-30 (1974).

frequently the lawyers are still unclear what to expect from a dispute resolver. It is still difficult to define "good" mediation.¹⁶² However, the party-neutral, well versed in the process, may be more critical of the dispute resolver, especially if he observes a style or approach different from his own. The neutral as a party may also be more critical because of his vested interest. Structuring the feedback might remedy this problem.

I suppose, though strongly doubt, it would be possible that, by requiring collaborative dispute resolution processes, use of the adversarial method will be discontinued. As emphasis is placed on selecting from the dispute resolution menu¹⁶³ or fitting the forum to the fuss,¹⁶⁴ adversarial methods are included.¹⁶⁵ Nonetheless, there may be some concern that mediation would be overused, although misgivings about the universe becoming too cooperative are likely premature.

The question arises of whether the participation of the neutral in a process and dispute similar to one to which he is subsequently assigned as a neutral must be disclosed to the parties.¹⁶⁶ If the requirement becomes part of training, the use of novice mediators having just completed training would also present problems. However, these mediators will begin mediating all types of disputes. A number of administrative issues related to such a requirement exist and need to be resolved prior to implementation. However, such concerns should not serve as a barrier to implementation.

Lastly, in mandating participation, the same problems and issues which are raised with general mandatory ADR exist.¹⁶⁷ However, coercion to mediate differs from coercion to settle. Since neutrals face these issues on a regular basis, any understanding gained from personal experience would be beneficial. Modification of the requirement to include contractual ADR may be less problematic. This alternative would require the neutral to plan for

¹⁶² James I. Alfini, *Trashing, Bashing and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47 (1991); ROGERS & MCEWEN, *supra* note 37, § 2.04.

¹⁶³ KOVACH, *supra* note 1, at 14.

¹⁶⁴ Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994).

¹⁶⁵ *Id.* at 53.

¹⁶⁶ While ethical codes and standards have not specifically addressed this situation, most, when confronted with conflict-of-interest issues, err on the side of disclosure. *See* MODEL STANDARDS, *supra* note 52.

¹⁶⁷ Katz, *supra* note 48; *see also* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993); SPIDR, MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS, Report 1 of the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (1990).

future disputes. She would be compelled to agree to submit a subsequent dispute to arbitration or mediation as part of her training. Other concerns may arise as well. However, in the end, even with the challenges presented by a directive that mediators mediate, when balanced with the resultant experience, the good inures to the benefit of both the process and profession.

VI. CONCLUSION AND RECOMMENDATIONS

The initial purpose of this study was to determine the degree to which dispute resolvers resolve their own disputes by the very processes which they champion. That has been accomplished, though a comparison with the general public may provide additional perspective. The secondary goal was to stimulate the thought of neutrals who just did not think of the application of ADR to themselves. A few respondents did indicate that they had not previously considered the application to themselves but will do so in the future.¹⁶⁸ Hopefully, as a result, dispute resolvers will consider and ultimately conclude that those processes which they advocate for others are worthy for themselves. Lastly, the survey presented the opportunity to suggest, albeit strongly, that ADR practitioners, and in particular mediators, must "walk the talk." This principle, too, was acknowledged in a few responses.

What better method of education about ADR than to experience it for yourself? Granted, there are concerns with implementing any new requirement for a profession. In this case, the inability to see the process objectively, administrative matters, and general concerns with mandating participation in ADR are all problematic. No doubt, additional ethical and practice issues will emerge. Yet these obstacles can be overcome and perhaps even produce benefits. An understanding of the process from a very critical viewpoint can only add to its effectiveness. In fact, what can be learned by dispute resolvers participating in the processes can assist the profession in its struggles for identity, regulation, understanding, and professionalism.

I believe that if more mediators and dispute resolution practitioners were to use the processes themselves in both personal and professional matters, not only would they likely be more competent mediators with a better and more complete understanding of the process, but would also be more committed to the process and the profession. I recognize that additional research is necessary before such a condition of training can be established. Perhaps a pilot implementation of the requirement, using a control group with evaluative follow-up would be a good way to begin. As

¹⁶⁸ Questionnaires on file with author.

a dispute resolver, I welcome options, ideas and alternatives, as well as differences of opinion. Yet in the end I predict you will find that, in most cases, advantages will outweigh the difficulties.

One of the most difficult issues facing the profession of mediation at this time is that of quality control. As requirements for mediators develop, it is strongly urged that, in addition to others, experience and commitment to the process, in personal disputes or conflicts, become elements of any established qualifications. There are a number of different organizations examining this issue; these groups, in their deliberations, should also be "walking the talk."

Walking the dispute resolution talk could have very positive implications for the profession. As more individuals enter the field, whether as disputing parties, their representatives, referring entities such as courts or agencies, or as providers of dispute resolution services, the greater the opportunity for conflict. As additional attempts at regulation are made, it is likely that the number of disputes will increase. If all practitioners subscribe to the use of mediation, not only will the mediator's understanding, knowledge, and skills be enhanced, but mediators can use the process to better resolve those difficult issues facing the profession and simultaneously provide the most effective marketing device available. The practitioner can truly say, "I provide and subscribe to the precepts of alternative dispute resolution." Yes, mediators must mediate.

MEDIATION FOR MEDIATORS

APPENDIX

Dear Dispute Resolver:

In the past several years, we have made great progress in advancing the use of mediation, arbitration, and other forms of ADR. Yet, we still have much to learn about the use of these processes.

I am a professor at South Texas College of Law where I teach mediation. I also train mediators and other dispute resolution neutrals. I am attempting to determine the degree of ADR use within the profession. I would be very grateful if you would complete the attached survey and return it to me no later than January 16, 1995. An addressed stamped envelope is enclosed for your convenience.

I will not, in the dissemination of the data, identify any respondent by name. It is likely that I will use the information I receive and may, however, quote (without providing a name) certain responses.

Thank you in advance for assisting in this research which will hopefully assist the field of dispute resolution.

Best regards,
Professor Kimberlee K. Kovach

P.S. I welcome any thoughts or comments you may have.

**USE OF ADR
SURVEY**

I. (OPTIONAL)

A. Name

B. Address

C. Telephone

II. EDUCATIONAL BACKGROUND

A. Undergraduate Degree Obtained _____
Year: 19 _____

B. Graduate Degree Obtained _____
Year: 19 _____

C. Doctorate _____
Year: 19 _____

III. LICENSES OR PROFESSIONAL DESIGNATIONS

IV. DISPUTE RESOLUTION OR MEDIATION TRAINING (please list training group, nature of training, length of training, and the date for each training)

MEDIATION FOR MEDIATORS

V. Have you been:

Mediating _____ Arbitrating _____ Other _____

_____ less than a year
_____ 1-2 years
_____ 3-4 years
_____ 5-10 years
_____ over 10 years

VI. Approximately how many disputes have you mediated/arbitrated in the past six months (please circle correct process)?

_____ 10 or less
_____ 10-25
_____ 25-50

VII. Do you teach or train in the dispute resolution field?

Yes _____ No _____ If yes, how often?

VIII. Have you ever administered a conflict resolution program?

Yes _____ No _____ If yes, for how many years? _____

IX. Do you incorporate mediation/conflict management principles in your daily work?

Yes _____ No _____ If yes, please explain specifically how you do so:

X. Does your partnership, business agreement, or other work activity include a mediation or dispute resolution clause?

Yes _____ No _____ If not, why not?

XI. Do your employment agreements contain dispute resolution clauses?

Yes _____ No _____ If not, why not?

XII. Are disputes in your workplace mediated?

Yes _____ No _____ If not, how are they handled?

XIII. Have you been a party in mediation to resolve a dispute with a third party or business?

Yes _____ No _____ How many times?

XIV. If you have been a party to a mediation, describe your feelings about the process:

_____ very satisfied
_____ satisfied
_____ somewhat satisfied
_____ neither satisfied nor dissatisfied
_____ dissatisfied
_____ very dissatisfied

XV. If you have been a party to a mediation, did the matter:

_____ settle at the mediation
_____ not settle at the mediation, but shortly afterwards
_____ not settle at all

XVI. Have you ever been a party in another ADR process?

Yes _____ No _____ If yes, please describe.

MEDIATION FOR MEDIATORS

XVII. Have you bought a home or a car in the past five years?

Yes _____ No _____ If yes:

1. Was there an ADR clause in the original contract? Yes _____ No _____

2. If an ADR clause was not in the original contract, did you request one be inserted? Yes _____ No _____

3. Was such a clause inserted? Yes _____ No _____

4. If such a clause was not inserted, did you sign the document anyway?

Yes _____ No _____ If yes, why was the clause not essential?

XVIII. Have you been divorced in the past five years?

Yes _____ No _____

If yes, was it mediated? Yes _____ No _____

If not, why not?

XIX. If you were negotiating a contract today, check which statement best describes your attitude:

1. _____ It would not matter to me if the contract contained an ADR clause.

2. _____ I would suggest that an ADR clause be included, but the absence of a clause would not preclude my signing the contract.

3. _____ I would insist that the clause be included, or I would not sign the contract.

XX. If you were to insist on an ADR clause, what process would you choose?

Mediation _____ Arbitration _____ Other _____

XXI. Do you have a mediation clause in your engagement letter for mediation services?

Yes ____ No ____

XXII. Do you have minor children? Yes ____ No ____

1. If you have minor children, have you taught them mediation?

Yes ____ No ____

2. Have you applied mediation theory in parenting? Yes ____ No ____

If yes, how:

3. If you have applied mediation in parenting, has it been successful?

Yes ____ No ____

XXIII. Check which statement reflects your feelings:

____ 1. I always apply mediation in my personal affairs.

____ 2. I sometimes apply mediation in my personal affairs.

____ 3. I never apply mediation in my personal affairs.

XXIV. Check which statement reflects your feelings:

____ 1. I always apply mediation in my business affairs.

____ 2. I sometimes apply mediation in my business affairs.

____ 3. I never apply mediation in my business affairs.